Supreme Court, U.S.
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IN THE
Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONERS GUY MITCHELL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONERS GUY MITCHELL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The court of appeals held, as a categorical matter, that it is unconstitutional for government agencies to lend instructional materials (other than textbooks) to children in religious schools. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 70a-71a. In so doing, the court created an express conflict with a decision of the Ninth Circuit upholding "a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish." *Id.* at 59a; *see also Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995).

In their Brief in Opposition ("Opp."), respondents offer no defense of the holding below. Instead, they argue that the educational program at issue here is unconstitutional for a reason not mentioned by the court of appeals – indeed, treated by the court as legally irrelevant – namely, that, on the facts of this case as the program is administered in Jefferson Parish, there have been insufficient safeguards to ensure that the instructional materials were devoted solely to their intended use. Opp. 6. Similarly, respondents seek to distinguish *Walker* on the basis of a minor factual distinction on which neither the Ninth Circuit nor the court below relied – namely, that the Chapter 2 program in *Walker* was, respondents say, "confined only to prescreened textbooks, instructional materials, and 'locked' computer hardware and software." Opp. 15. Beyond that, respondents offer tendentious readings of this Court's decisions that go solely to the merits and do not provide any reason to deny the petition for certiorari.

Respondents' arguments should be rejected. First, by declining to defend the reasoning of the Fifth Circuit, respondents implicitly concede the need for review of the

holding below. Second, the factual arguments respondents make are not supported by the record and in many cases are contradicted by the record. Finally, in their doctrinal arguments, respondents attempt to resurrect an Establishment Clause jurisprudence that this Court has long and wisely abandoned. Petitioners reply briefly to each point in turn.

I. EVEN RESPONDENTS DO NOT DEFEND THE CATEGORICAL APPROACH TAKEN BY THE COURT OF APPEALS.

If anything, the Brief in Opposition *underscores* the flaw in the opinion below and makes the necessity of review by this Court all the more clear. Instead of defending the Fifth Circuit's categorical approach to educational aid, respondents offer an alternative analysis that would, they say, lead to the same result. This is the clearest possible evidence that the decision below went astray from this Court's precedents and requires review.

The court of appeals adopted the "clear and simple" view that *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), unconditionally prohibit the loan of instructional materials other than textbooks for the benefit of students attending religiously-affiliated schools. Pet. App. 65a-66a. For that reason, the court of appeals needed less than a paragraph of analysis to apply *Meek* and *Wolman* to this case and direct the entry of summary judgment in favor of respondents. *Id.* 71a.

Respondents ignore the categorical rule adopted by the court of appeals and instead argue about what they say are the facts of the Chapter 2 program as operated in Jefferson Parish. *See* Opp. 6 ("[e]ven if, *arguendo*, petitioners are correct in their legal argument . . . the Judgment of the court below is fully supported by the record"). But the court below treated all of these safeguards

and monitoring as irrelevant to the decision, which was controlled by the "character of the aid," Pet. App. 67a, rather than the circumstances under which the program is administered. In this sense, the decision below bears the same relation to the loan of instructional materials that *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), did to on-premises remedial teaching: according to the decision, the facts do not matter; any substantial aid to the educational mission of religious schools is inherently problematic. Our position is simply that this Court should apply the principle of *Agostini v. Felton*, 521 U.S. 203 (1997), to other forms of aid to students in nonpublic schools, including instructional materials. Educational aid should be permitted whenever it is provided on neutral terms and with reasonable safeguards against governmental indoctrination. As the Ninth Circuit held in *Walker*, in conflict with the decision below, Chapter 2 programs satisfy those criteria.

Respondents similarly attempt to obscure the square conflict between *Walker* and the decision below by focusing on imagined factual differences between the aid provided in the two cases. Opp. 6, 15. But the court of appeals' decision did not turn on such questions and, indeed, expressly held that they were irrelevant to its analysis. *See supra.* Nor did the Ninth Circuit's opinion turn on the factual details respondents find so important.[1]

Respondents take the same approach when dealing with the importance of the question presented, suggesting

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[1] In any event, respondents' purported factual distinction is no distinction at all. The Ninth Circuit's decision did not deal only with "locked" computers but also upheld the constitutionality of Chapter 2 loans of the precise aid at issue here, including "unlocked" computers and other instructional materials. *See Walker*, 46 F.3d at 1464 & n. 13.

that certiorari is not appropriate because the decision of the court of appeals, even if wrong, "relate[s] only to the . . . *administration* of Chapter 2 in *one* Louisiana parish school district." Opp. 6. Unfortunately, the decision has impact far beyond the boundaries of Jefferson Parish. Throughout the Fifth Circuit, students attending nonpublic schools will likely be denied all forms of instructional material other than textbooks, regardless of the monitoring, safeguards, or other procedures employed in the program. As the Secretary of Education points out, "the court of appeals has invalidated a form of federal assistance that is highly relevant for private schoolchildren, and also central to the effort to bring modern technology to all students." Brief for the Secretary of Education ("Sec. Br.") 20.[2]

Chapter 2 has been a fixture of the modern educational scene, in one form or another, for over 30 years. Petition for a Writ of Certiorari ("Pet.") 3. More than 50 million children currently benefit from it. Sec. Br. 19 n.10. The decision below, if not reviewed, will seriously disrupt administration of this nationwide program. The petition thus presents an issue of great importance.[3]

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[2] Even setting aside the absolute rule employed by the court of appeals, the particular practices involved in this case are typical of those throughout the nation. *See* Pet. App. 59a (comparing program to that in *Walker*). Indeed, each of the safeguards and practices identified in the recent U.S. Department of Education Guidance to all State Educational Agencies was contained in the Louisiana State Guidelines at issue in this case. *Compare* U.S. Dep't of Educ. Guidance at 19-20 (lodged with Clerk) *with* Ex. D-4 (State Guidelines at issue here) attached ("attach.") to district court docket sheet document number ("Doc.") 179.

[3] The program at issue here, unlike the vestigial and case-specific program at issue in *Helms v. Picard*, No. 98-1658, is of continuing national importance.

II. RESPONDENTS MISSTATE THE RECORD.

The Brief in Opposition is essentially a trial brief, replete with respondents' hoped-for findings of fact and their own characterizations of the record. As noted above, this attempt to retry the case is utterly irrelevant to the legal analysis of the decision under review. But, to make matters worse, many of respondents' statements about the facts of the case are simply incorrect. The following are among the more significant examples:

(1) The Louisiana Department of Education Guidelines ("Guidelines") require nonpublic school officials to sign a written assurance that Chapter 2 materials "will only be used for secular, neutral and nonideological purposes." Ex. D-4 at 85 attach. to Doc. 179. Respondents dismiss these mandatory written assurances as "merely statements of good intent." Opp. 20. But the testimony respondents cite as the sole record support for their characterization concerns the old, voluntary assurance forms used *before* promulgation of the Guidelines.[4] Indeed, the same witness later confirmed that, under the Guidelines, the State *requires* completion of the assurance forms and ongoing compliance with them. *See* 6/19/89 Lewis Deposition ("Dep.") at 59 (participants "must sign" and "must assure [State]" of matters contained on form), 66-67 (State could terminate participation of school that did not comply with assurance) attach. to Doc. 165. Respondents' statement is therefore not only misleading but, as it relates to the Guidelines actually at issue below, false.

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[4] *Compare* 1/12/89 Lewis Dep. at 104 (discussion of old policy) attach. to Doc. 165 *with* Ex. D-4 at 85 (new Guidelines issued 5 months after initial Lewis deposition) attach. to Doc. 179.

(2) Respondents contend that "nonpublic schools . . . are not given any catalogs from which they must order" the books loaned under Chapter 2. Opp. 20. But, the testimony respondents cite in support of this statement demonstrates exactly the opposite: there the Jefferson Parish Chapter 2 coordinator confirms that the school district itself does not provide catalogs because it has contracted with independent book jobbers, who provide the catalogs. 4/1/87 Woodward Dep. at 38 attach. to Doc. 165; *see also* Woodward Declaration ¶ 3 Ex. UU attach. to Doc. 178 (book "[o]rders are placed from catalogs provided by the book jobbers").

(3) Respondents assert that "[n]o inspection of [a] book's content is made" to check for religious content. Opp. 2. In fact, however, the record is clear that book requests are reviewed and any religious title deleted and that annual monitoring visits by Jefferson Parish monitors include random sampling of books purchased with Chapter 2 funds to determine if they have religious content. *See* Pet. 8-9.

(4) Respondents assert that program safeguards broke down, resulting in regular purchases of religious books and use of Chapter 2 filmstrip projectors in theology class. Opp. 2, 4 & n.2. But the religious books were purchased in the 1982 school year -- *long* before implementation of the Guidelines at issue here. Pet. App. 91a. There is no evidence that lapses occurred under the program challenged. As for the filmstrip projectors, respondents misleadingly cite to a chart concerning use of all audio visual materials, including materials *not* purchased with Chapter 2 funds. Opp. 4 n.2 (citing Woodward Ex. 21). This is not evidence – and there is no evidence -- that materials purchased with Chapter 2 funds were used in theology class.

(5) Respondents suggest that Louisiana State officials cannot be trusted to follow the State Guidelines because officials administering a completely different program – a

mandated cost program akin to that at issue in *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) -- allegedly made occasional lapses. Opp. 21-22. This is difficult to square with respondents' own decision to settle the case on terms that entrust future administration of the mandated cost program to these same State officials.[5]

(6) Respondents assert that Chapter 2 materials are ordered for use by nonpublic school students "without question" by public officials. Opp. 1. In fact, however, nonpublic school officials must submit an "evaluation plan" describing the intended use for each requested item. *See* Ex. D-4 at 62 (completed form describing what class computer will be used in and for what purposes) attach. to Doc. 179. As noted above, nonpublic school officials are also required to sign a written assurance that the materials will be used exclusively for "secular, neutral and nonideological purposes." *Id.* at 85. Also, public employees review material requests and monitor usage of materials. *See* Pet. 9.

(7) Respondents contend that, once materials are ordered, "there is no way to determine if [they] are being diverted to religious use." Opp. 4. This ignores the fact that nonpublic school officials must submit a detailed "evaluation report" specifying how the use of the materials in practice

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[5] The settlement and the adoption of new auditing procedures subsequent to the district court's order resulted in a court order that "effective immediately, the state defendants . . . are free to administer the program and disburse funds." 10/16/97 Order On Joint Motion Re Required Services Reimbursement Program. It is these changed circumstances mooting the original order, and not, as respondents falsely suggest, some admission of the untrustworthiness of State officials, that resulted in "not one of the defendants appeal[ing] the ruling" concerning that separate program. Opp. 22.

compares with the "evaluation plan" submitted prior to receiving materials. *See* Ex. D-4 at 62-63 (identifying how many students used computers and in which classes and for what purposes they were used) attach. to Doc. 179. In addition, logs are kept of usage of the materials, and these logs, along with other indicia of use of the materials, are checked as part of the annual monitoring visit. *See* Pet. 9.

The court of appeals directed that summary judgment be granted in favor of respondents. Pet. App. 71a. Given this procedural posture, petitioners are entitled to have all record evidence viewed in the light most favorable to their position. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Not only do respondents fail to do this, but they flatly misstate the record. On the true record, it is clear that the uncontested material facts demonstrate that the challenged Chapter 2 program is fully consistent with the Establishment Clause.

III. RESPONDENTS' PROPOSED RULE OF LAW HAS NO BASIS IN THE ESTABLISHMENT CLAUSE AND IMPROPERLY ELEVATES FORM OVER SUBSTANCE.

Eschewing the approach taken by the court of appeals – which focused exclusively on the "character of the aid" provided under the program – respondents argue that the determinant of whether aid is permissible or impermissible under the Establishment Clause is whether it is "direct aid" or "indirect aid." Opp. 7-9.

The first problem with respondents' approach is that it relies on misstatements of the rationale and holdings of the Supreme Court opinions it cites. For example, respondents portray the decision in *Regan* as turning on "whether the aid in question was direct or indirect." Opp. 9. But, in fact, *Regan* dealt with the provision of direct cash reimbursements

to nonpublic schools, *Regan*, 444 U.S. at 657, and explicitly rejected the simplistic "direct/indirect" dichotomy on which respondents now depend. And the aid in *Bowen v. Kendrick*, 487 U.S. 589 (1988), which respondents describe as "acceptable because it involved indirect grants," Opp. 10, clearly was not "indirect." It provided direct grants to religiously-affiliated organizations. *Bowen*, 487 U.S. at 593. The Court in *Bowen* made clear that the distinction between direct and indirect aid, in itself, did not decide the question. *Id.* at 608-609.

Furthermore, in contrast to the court of appeals, respondents argue that the very materials at issue in this case *could* be permissibly furnished "so long as they are provided directly to the student by *pub[l]ic school officials or contractors.*" Opp. 28. But this is nothing more than a replay of the argument rejected by this Court in *Agostini*. There schools applied, on behalf of groups of students, for the services at issue. This Court found the distinction between a program delivering aid to individual students, *see Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and one delivering aid to groups of students "not constitutionally significant." *Agostini*, 521 U.S. at 228. This Court also rejected as "[not] meaningful" any distinguishing between situations in which schools, as opposed to individual students, file applications for the aid. *Id.* Here, as in *Agostini*, "funds are . . . distributed to a public agency (an LEA) that dispenses [the aid] directly to eligible students within its boundaries, no matter where they choose to attend school." Opp. 11 (quoting *Agostini*, 521 U.S. at 228). Here, as in *Agostini*, the fact that the aid may benefit more than one student is "not constitutionally significant." Any contrary rule would elevate form over substance.

Indeed, as the Secretary of Education has pointed out, the amount of aid per student involved here would not be enough to permit purchase of a computer or other

instructional materials for *each* student in the program. *See* Sec. Br. 19-20 & n.10. Nor would that be a sensible use of limited resources. *Id.* Respondents' proposed prohibition on provision of aid to groups of students would read into the Establishment Clause the requirement that aid be provided in an impractical and unnecessarily expensive manner.

CONCLUSION

The decision below creates a square and express conflict in the circuits on the constitutionality of a decades-old federal aid-to-education program which helps tens of millions of schoolchildren each year. This Court should grant the petition to resolve the significant constitutional question presented and to confirm that nothing in the Establishment Clause prevents children who attend religiously affiliated schools from participating in Chapter 2 on an equal basis with all other schoolchildren.

Respectfully submitted,

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